WESTERN SHOSHONE NATIONAL COUNCIL

IBLA 94-492 Decided July 26, 1994

Appeal from a decision of the Battle Mountain District Manager, Bureau of Land Management, approving development plan of operations N64-94-001P.

Request for stay denied; order to show cause.

1. Administrative Authority: Generally--Appeals: Jurisdiction--Public Lands: Jurisdiction Over

   The Tribal aboriginal title of the Western Shoshone has been extinguished pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1055 (1946).

2. Administrative Procedure: Standing--Rules of Practice: Appeals: Standing to Appeal

   Under 43 CFR 4.410(a), a person must be both a party to the case and adversely affected by a decision to have standing to appeal to the Board of Land Appeals.

3. Administrative Procedure: Stays--Mining Claims: Plan of Operations

   Revised 43 CFR 4.21(a) governs the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing mining plans of operation contain a "pertinent regulation" within the exception of 43 CFR 4.21(a). Under 43 CFR 3809.4(f), the filing of an appeal shall not stop the authorized officer's decision from being effective.

APPEARANCES: Raymond Yowell, Duckwater, Nevada, for appellant; Charles A. Jeannes, Esq., Reno, Nevada, for Cortez Gold Mines.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Western Shoshone National Council has appealed a May 4, 1994, 1/ decision of the Battle Mountain District Manager, approving Cortez Gold

1/ This date is at best approximate because the decision appears to have been prepared on May 5, 1994.

Mines' development plan of operations for the Crescent Pit project in Lander County, Nevada, prepared by Cortez Gold Mines. Western Shoshone's notice of appeal includes a request for stay of BLM's decision.

In its appeal document and statement of reasons, appellant states that it exercises sovereign jurisdiction over the Crescent Pit area and waives no rights and recognizes no other sovereign within the borders of Newe Segobia pursuant to the Treaty of Ruby Valley of 1863. Appellant's assertion of sovereignty over the lands under review may be read to place at issue this Board's jurisdiction to hear the appeal. Because of the importance of this question, we address it at the outset.

[1] The sovereignty of the Western Shoshone tribe over area lands has received extensive review by the courts. The cases make clear that tribal aboriginal title to area lands has been extinguished pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1055 (1946). U.S. v. Dann, 873 F.2d 1189, 1196 (9th Cir.), cert. denied, 493 U.S. 890 (1989). This result was reached after Western Shoshone's claims were reviewed in the United States Supreme Court. United States v. Dann, 470 U.S. 39 (1985).

[2] There being no Tribal sovereignty, the record is silent regarding appellant's standing to pursue this appeal. Standing to appeal is governed by 43 CFR 4.410(a), which provides in part: "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board." (Emphasis added.)
A person must be both a party to a case and adversely affected in order to have a right to appeal. If either element is lacking, an appeal must be dismissed. Mark S. Altman, 93 IBLA 265, 266 (1986).

A party to a case is the responsible party who has taken the action which is the subject of the BLM decision on appeal, is the object of that decision, or who has otherwise participated in the decisionmaking process leading to that decision. Stanley Energy, Inc., 122 IBLA 118, 120 (1992). To be a "party to a case" a person must have actively participated in the decisionmaking process regarding the subject matter of the appeal. Sharon Long, 83 IBLA 304, 307 (1984).

To be adversely affected, the record must show that appellant has a legally recognizable interest that is injured. This interest need not be
an economic or property interest, but mere interest in a problem or deep concern with the issues will not suffice. Use of the land involved or ownership of adjacent property will, however. The Wilderness Society, 110 IBLA 67, 70 (1989).

BLM's decision record indicates that BLM received no public comments addressing the Crescent Pit project in response to its public news release and "Dear Interested Party" letter. This letter, which was sent to the Shoshone-Eureka Resource Area's mailing list, provided a comment period
in fulfillment of the public scoping process (Decision Record, Apr. 6, 1994, at 2).

Appellant's standing to appeal BLM's decision of May 4, 1994, is not apparent from the record. It is therefore appropriate to have the appellant show cause why this appeal should not be dismissed for lack of standing. To this end, appellant is granted 30 days from receipt of this decision to file a statement setting forth facts sufficient to satisfy the requirements of 43 CFR 4.410 with this Board. If no statement is filed in a timely manner, this appeal will be dismissed.

The decision under review was enclosed in a May 4, 1994, BLM letter addressing the standards for obtaining a stay in some detail and advising potential appellants that if they wished to file a petition for stay under 43 CFR 4.21 or 43 CFR 3809.4, a stay petition must accompany the notice of appeal. 2/ The letter further provided that copies of the notice of appeal and petition for stay must be served upon all adverse parties, the Solici-tor, and this Board when the original documents are filed with the Area Manager.

[3] The regulations addressing the effect of a decision pending appeal were substantially changed effective February 18, 1993. Under 43 CFR 4.21(a)(2), as revised, a decision is effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal, unless a petition for stay pending appeal is filed with a timely notice of appeal. 3/ The general provisions of revised 43 CFR 4.21(a) make it clear, however, that this change did not occur across the board. The qualifying language at the beginning of subsection (a) states: "Except as otherwise provided by law or other pertinent regulation." Because BLM's letter of May 4, 1994, does not fully reflect the distinction created by this qualifying language, the following discussion is warranted.

In the case now under review the procedures applicable to obtaining a stay are found at 43 CFR 3809.4(f) rather than 43 CFR 4.21(a). 43 CFR 3809.4(f) addresses the effect of a decision to approve a mining plan of operations during the appeal period. This regulation provides that the effectiveness of the authorized officer's decision is not stopped by filing an appeal. There is no mention of a petition for stay and there is no requirement that a petition accompany a notice of appeal. BLM's statement to the contrary in its May 4, 1994, letter was misleading.

43 CFR 3809.4(f) is one example of the special rules mentioned in the preamble to 43 CFR 4.21. The preamble states, in part:

2/ BLM stated that a petition must address (1) the relative harm to the parties if the stay is granted or denied, (2) the likelihood of appellant's success on the merits, (3) the likelihood of immediate and irreparable harm if the stay is not granted, and (4) whether the public interest favors granting the stay.
3/ Prior to its change, 43 CFR 4.21 provided that a decision would not be effective during the appeal period or during the pendency of the appeal when an appeal was filed.

> It should be noted that, as stated in the text of the rule, whenever there is a conflict between the provisions of § 4.21
> and a special rule applicable to a particular type of proceeding, * * * the special rule will govern.

58 FR 4939 (Jan. 19, 1993). The Board has recognized that similar special rules apply to mineral leasing rights-of-way, Texaco Trading & Transportation, Inc., 128 IBLA 239, 240 (1994); grazing, National Wildlife Federation v. Bureau of Land Management, 128 IBLA 231, 235 (1994); forest management, In re Eastside Salvage Timber Sale, 128 IBLA 114, 115 (1993); and wild horse removal, Michael Blake, 127 IBLA 109, 110 (1993).

Nothing in the regulations at 43 CFR Part 4 precludes appellant from filing a petition or request for a stay at any time during a proceeding before the Board, however. Robert E. Oriskovich, 128 IBLA 69, 70 (1993).
A stay petition or request may be entertained by the Board at its discretion. Although 43 CFR 4.21 would not be applicable, the standards applied by the Board when addressing this question are essentially those set out at 43 CFR 4.21(b). Jan Wroncy, 124 IBLA 150, 152 (1992). Any party requesting a stay bears the burden of proof to demonstrate that a stay should be granted. It should also be noted that the service requirements for stay petitions or requests appear at 43 CFR 4.413.

Applying the standards set forth in Wroncy and assuming, arguendo, appellant's standing, we find that appellant has made no attempt to address any of these issues in its appeal document and statement of reasons, and
its request for a stay is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellant's assertion of sovereignty is rejected, its petition for stay is denied, and appellant is granted 30 days from receipt of this decision to show cause why its appeal should not be dismissed for lack of standing.

R. W. Mullen
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge